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No. 93-981

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

RESHAT SHABANI

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether, to establish a violation of the drug conspiracy statute, 21 U.S.C. 846, the government must prove an overt act in furtherance of the conspiracy.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 993 F.2d 1419.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 1993. A petition for rehearing was denied on September 22, 1993. Pet. App. 10a. The petition for a writ of certiorari was filed on December 21, 1993, and was granted on February 22, 1994. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

(emphasis added). In reaching the conclusion that conspiracy prosecutions fell within an exception to the holding of *Grady*, the *Felix* Court necessarily determined that section 846 requires an overt act as an essential element.

B. A review of the historical development of conspiracy law also favors the view that section 846 should be interpreted as requiring proof of an overt act. The original statutory provisions punishing conspiracy in the thirteenth through fifteenth centuries required proof of an overt act. Although dicta in subsequent cases purported to allow conviction without proof of an overt act, in practice overt acts were pled in indictments or given to defendants in bills of particulars as a matter of right. To the extent that the English common law condoned conspiracy prosecutions without proof of overt acts, this Court stated early on that such indictments have "not met with the approval of the courts in this country." *Bannon and Mulkey v. United States,* 156 U.S. 464, 468-469 (1895). Thus, the prevailing view at the time that Congress passed the general conspiracy statute (now codified at 18 U.S.C. § 371) was that proof of an overt act was an element of a conspiracy prosecution. That being so, the use of the word "conspiracy" should also indicate an overt act element, at least without express language to the contrary.

Concededly, two decisions of this Court have interpreted two statutes lacking explicit overt act requirements as not requiring proof of an overt act. *Nash v. United States*, 229 U.S. 373 (1913); *Singer v. United States*, 323 U.S. 338 (1945). These decisions, however, were part of an expansion of the reach of conspiracy law which has subsequently been criticized by this Court and by commentators. Thus, the continued validity of their holdings is subject to question. Moreover, it was against this background of favoring limits on the scope of conspiracy prosecutions, that Congress

enacted section 846. Section 846 therefore should be interpreted as requiring proof of an overt act.

C. Other principles of policy and statutory construction weigh in favor of finding an overt act requirement in section 846. First, without an overt act requirement, conspiracy threatens the venerable principle that a person cannot be punished for his or her thoughts alone. This Court should interpret section 846 as requiring an overt act in order to avoid violating this sound principle of criminal responsibility. Second, the numerous federal conspiracy statutes which overwhelmingly include explicit overt act requirements should be interpreted *in pari materia*; thus, this Court should find an overt act requirement in section 846 as well. Third, this Court should apply the lenity principle in construction of penal statutes demarcating where criminal liability begins in the area of conspiracy law; where doubt exists, the line of liability must be drawn at the point at which one of the conspirators does an overt act.

ARGUMENT

I.

IN *UNITED STATES v. FELIX*, THIS COURT CONCLUDED THAT AN OVERT ACT IS AN ESSENTIAL ELEMENT OF A CONSPIRACY UNDER 21 U.S.C. 846.

In the recent case of *United States v. Felix*, ____ U.S. ____, 118 L.Ed.2d 25 (1992), this Court had occasion to consider the drug conspiracy statute at issue in this case, 21 U.S.C. § 846. In *Felix,* the defendant had been charged with and convicted of a drug conspiracy under section 846. In that prosecution, two of the nine overt acts alleged as supporting the conspiracy were based upon conduct for which Felix had already been prosecuted. Felix thus contended that the conspiracy prosecution violated the Double

Jeopardy Clause. *Felix*, 118 L.Ed.2d at 30-31; *see* U.S. Const. Amend. V ("nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb").

In particular, Felix relied upon this Court's holding two years earlier in *Grady v. Corbin*, 495 U.S. 508 (1990). Felix pointed to this Court's statement in *Grady*, "that the Double Jeopardy Clause bars a prosecution where the Government, 'to establish *an essential element of an offense* charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted.' " *Felix*, 118 L.Ed.2d at 35, quoting *Grady*, 495 U.S. at 521 (emphasis added). This Court was not persuaded by Felix's argument, and stated "[t]aken out of context, and read literally, this language supports the defense of double jeopardy. But we decline to read the language so expansively. . . ." *Felix*, 118 L.Ed.2d at 35.

This statement by the *Felix* Court constitutes a determination that an overt act is "an essential element of [the] offense" of federal drug conspiracy under section 846. If the federal drug conspiracy statute did not require proof of an overt act, this Court would not have found it necessary to reach the issue raised by Felix. Without an overt act requirement, the acts relied on in prosecuting Felix would not have been "essential elements" of the offense, and thus *Grady* would have been easily distinguished. Although interpretation of the drug conspiracy statute was not the Court's "immediate concern" in *Felix*, the Court's reading of the statute was nonetheless "necessary for, and integral to" its conclusion; thus, it cannot be dismissed as "merely dictum." *See California v. Federal Energy Regulatory Comm.*, 495 U.S. 490, 500-501 (1989) (rejecting petitioner's attempt to characterize statutory interpretation by the Court in *First Iowa Hydro-Electric Cooperative v. Federal Power Comm.*, 328 U.S. 152 (1946) as "merely dictum").

The question of whether the drug conspiracy statute required an overt act clearly arose in *Felix*. It was addressed by the dissenting judge in the lower court's ruling. *United States v. Felix*, 926 F.2d 1522, 1536 (10th Cir. 1991) (Anderson, J., dissenting). Moreover, two justices of this Court explicitly begged to differ with this Court's holding regarding the double jeopardy implications of prosecutions for conspiracies and overt acts in the context of section 846. Justices Stevens and Blackmun argued that it was unnecessary to reach the question of whether *Grady* applied to the situation in which a federal drug conspiracy case charges an overt act for which a defendant was previously prosecuted. Quoting from the dissenting judge in the Circuit Court, they argued that

> "the overt acts at issue here did not meaningfully 'establish' an essential element of the conspiracy" because there is no overt act requirement in the federal drug conspiracy statute and the overt acts did not establish an agreement between Felix and his coconspirators.

Felix, 118 L.Ed.2d at 38 (Stevens, J. with whom Blackmun, J. joined, concurring in judgment). The majority, however, rejected this reasoning, and in thus deciding the question of whether *Grady's* essential element test applied, necessarily concluded that section 846 requires as an essential element proof of an overt act.

This conclusion should not lightly be tossed aside in the case at bar. This case is a question of statutory interpretation. As this Court has stated,

> [a]dherence to precedence is, in the usual case, a cardinal and guiding principle of adjudication, and "[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legisla-

> tive power is implicated, and Congress remains free to alter what we have done.

California v. FERC, 495 U.S. at 499, quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-173 (1989). Unlike this Court's cases relied upon by the government which interpret similar statutes, *Felix* is the *only* case in which this Court has interpreted section 846. The numerous lower court cases cited by the government all precede *Felix*, and thus their continued persuasiveness is questionable. Thus, this Court must follow this precedent and hold in no uncertain terms that section 846 requires proof of an overt act.

Moreover, any retreat from this interpretation would undercut other aspects of the *Felix* holding and subject this Court's double jeopardy jurisprudence to question once more. As first noted in *Felix*, this Court found some difficulty applying *Grady's* double jeopardy holding in practice, particularly in the conspiracy context. Subsequently, this Court felt it necessary to overrule *Grady* and return to the double jeopardy test announced in *Blockburger v. United States*, 284 U.S. 299, 304 (1932). *See United States v. Dixon*, ____ U.S. ____, 125 L.Ed.2d 556, 572-573 (1993).[1] In order for this Court to now hold that the federal drug conspiracy law requires no overt act, this Court would have to dismiss as dicta its purported holding in *Felix*; that "holding" would be reduced to the conditional, "if the statute required proof of an overt act, then it would not have violated the Double Jeopardy Clause to prosecute defendant for the conspiracy after having prosecuted him for the overt acts." For good reason, this Court has elsewhere declined to

[1] The overruling of *Grady* on other grounds does not affect Shabani's analysis of the opinion in *Felix*.

engage in such advisory opinions.[2] This Court should thus refrain from rendering its *Felix* opinion an advisory one which would add confusion to this Court's double jeopardy jurisprudence. Rather than undercutting *Felix*'s holding, this Court should re-affirm *Felix*'s integral premise and hold that section 846 requires proof of an overt act.

II.

A HISTORICAL REVIEW OF CONSPIRACY LAW SUPPORTS THE INTERPRETATION THAT AN OVERT ACT IS REQUIRED BY SECTION 846

As will be demonstrated below, the development of the modern crime of conspiracy indicates that an overt act is required by section 846. First, overt acts were originally elements of conspiracy prosecutions, and remained so in practice up to Congress' passage of the first federal conspiracy statute. Second, the narcotics conspiracy law in question was originally passed against the background of significant cautions against extending the scope of conspiracy prosecutions.

[2] As this Court stated in *United States v. Freuhauf*, 365 U.S. 146 (1961):

> Such opinions, such advance expressions of legal judgment upon issues which remain unfocussed because they are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multi-faced situation embracing conflicting and demanding interests, we have consistently refused to give.

Id. at 157.

A. THE ORIGINS AND PRACTICE OF CONSPIRACY PROSECUTIONS DEMONSTRATE THAT OVERT ACTS WERE NORMALLY CHARGED IN CONSPIRACY PROSECUTIONS AS ELEMENTS OR AS COMMON PRACTICE

The government argues that by omitting an explicit overt act requirement in section 846, Congress intended to punish conspiracy on the "common law footing," that is, without requiring proof of an overt act. Appellant's Opening Brief at 11. The government relies on this Court's pronouncement that "where a federal criminal statute uses a common law term of established meaning without otherwise defining it, the general practice is to give that term its common law meaning." *United States v. Turley*, 352 U.S. 407, 411 (1957).

A review of the development of conspiracy law, however, supports defendant's interpretation that an overt act is an element of conspiracy. An overt act was originally a requirement of a conspiracy prosecution, and in later practice an overt act was usually identified.

The crime of conspiracy first emerged from the enactment of three statutes in the early fourteenth century, the third of which was known as the *Ordinancio de Conspiratoribus* (33 Edward I). It established a writ of conspiracy to punish early abuses of the criminal process by providing an action against combinations for procuring false and malicious promotions of indictments and pleas, somewhat akin to the modern tort of malicious prosecution. Sayre, *Criminal Conspiracy*, 35 Harv. L. Rev. 393, 394 (1922) [hereinafter "Sayre"]; *see* Wright, *The Law of Criminal Conspiracies* 12-15 (1887) [hereinafter "Wright"] ; Harno, *Intent In Criminal Conspiracy*, 89 U. Pa. L. Rev. 624, 624-625 (1941) [hereinafter "Harno"]; Goldstein, *Conspiracy To Defraud The United States*, 68

Yale L.J. 405, 415-416 (1958) [hereinafter "Goldstein"].[3] In the early conspiracy statutes, the crime of conspiracy was not complete without some overt act. As Bracton stated in the thirteenth century: "[n]or ought precept, conspiracy, precept and counsel to do harm, unless some act follows." Bracton, *De Legibus et Consuetudinibus Angliae* (Twiss Ed.), Vol. 2, 335-337, quoted in Bryan, *The Development of The English Law of Conspiracy* 14 (1909) [hereinafter "Bryan"]. This rule lingered for several centuries. In 1486, the preamble to a statute making it a felony to conspire to destroy the King declared that

> by the law of this land if actual deeds be not had, there is no remedy for such false compassings, imaginations, and confederacies against any Lord, etc. . . . and so great inconveniences might ensue if such ungodly demeanings should not be straitly punished before that actual deed be done.

3 Henry VII, C. 14, quoted in Bryan at 14-15.

The expansions of the application of the writ of conspiracy began in the Court of Star Chamber. Originally, a writ of conspiracy would lie only if a person were acquitted of the charges brought. In the landmark *Poulterers' Case*, however, Lord Coke first declared in dictum that a writ of conspiracy would lie "although nothing be put in execution." *Poulterers' Case*, 9 Co. Rep. 55b, 56b, 77 Eng. Rep. 813, 814 (Ct. of Star Ch. 1611). From this dictum sprang a series of cases

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[3] Several commentators, it should be noted, have questioned whether conspiracy is, strictly speaking, a common law crime. *See* Sayre, 35 Harv. L. Rev. at 396; *see* Wright, at 12-15 (1887) (listing seven reasons that establish nearly conclusively "that the crime of conspiracy was created by statute, and that no such crime was known to the 'common law' "); Harno, 89 U. Pa. L. Rev. at 624-625.

Although the writ of conspiracy was expanded beyond its original form in the centuries that followed, even in its modern incarnation it is traceable to the Edwardian statutes.

reiterating that principle which culminated in Lord Holt's statement that "the very assembling together was an overt act." *Reg. v. Bass*, 11 Mod. 55, 88 Eng. Rep. 881, 882 (1705). Subsequent cases stated that conspiracy was the gist of the crime, and that no overt act need be proven. *See, e.g., Rex v. Gill*, 2 B. & Ald. 204, 106 Eng. Rep. 341 (1818). At the same time, however, some judges doubted "whether, without an overt act, the conspiracy itself amounts to any crime." *Rex v. Seward*, 3 M. & M. 557, 563 (1834) (Williams, J.).

Moreover, although it was stated that the agreement and assembling together was the only overt act that need be proven, it was rare that this principle was actually applied. The general practice rather was to charge in the indictment that a person had done an act "*per conspirationem inter eos habitam*;" the conspiracy itself was a matter of aggravation. Bryan at 75. In later practice, prosecutors were compelled, upon request of the defendants, to furnish bills of particulars giving more specific information in respect to the charges to be repelled. Bryan at 82; 3 Chitty, *The Criminal Law* 1145 (5th Am. ed. 1847); Note, *Developments in the Law — Conspiracy*, 72 Harv. L. Rev. 920, 947 (1959) [hereinafter "Note, *Developments*"]. Case law confirmed that defendants were to be supplied with bills of particulars as a matter of right. *Reg. v. Rycroft*, 6 Cox. C.C. 76 (1852); *Reg. v. Stapylton*, 8 Cox. C. C. 69 (1857). *See* Bryan at 83.

Furthermore, to the extent that general indictments without overt acts were allowed in English courts, this country broke from that practice. As this Court noted in an early case on conspiracy, "the general form of indictment" without alleging overt acts "has not met with the approval of the courts in this country, and in most of the States an overt act must be alleged." *Bannon and Mulkey v. United States*, 156 U.S. 464, 468-469 (1895). Thus, despite broad dicta in case law suggesting that overt acts need not be alleged or proven

in conspiracy cases, there is substantial support for the view that in the mid-nineteenth century overt acts were part and parcel of conspiracy indictments.

It was against this backdrop, furthermore, that Congress first legislated in the area of conspiracy. Congress explicitly included an overt act requirement in the federal general conspiracy law. 18 U.S.C. § 371. But the inclusion of the overt act requirement was not accompanied by any explanation of the function it was to serve. The first such law was enacted as part of a revenue statute entitled "An Act To Amend Existing Laws Relating to Internal Revenue, and for Other Purposes." Ch 169, 14 Stat. 471, 484 (1867); *see generally* Note, *Developments*, 72 Harv. L. Rev. at 946 & n. 176. The original act had not contained a conspiracy section. The amendments added the conspiracy section, but the debates as recorded in the Congressional Globe give no reason for including the overt act requirement. *See* Note, *Developments*, 72 Harv. L. Rev. at 946 n. 176. Subsequent codifications and revisions were made with little attention given to the overt act requirement. *Id.* Thus, the inclusion of an overt act element in this early statute, one commentator has suggested, "represented merely a legislative interpretation of what was necessary to prove a conspiracy at common law." *Id.* at 946-947. This suggests that, should this Court seek guidance from the "common law" definition of conspiracy, this Court would include an overt act requirement in section 846.

B. AFTER A PERIOD OF UNWARRANTED EXTENSION OF THE REACH OF CONSPIRACY LAW, THIS COURT'S WARNINGS AGAINST EXPANDING THE SCOPE OF CONSPIRACY PROSECUTIONS INDICATE THAT AN OVERT ACT IS A NECESSARY ELEMENT OF SECTION 846

The government points to two cases in which this Court held that an overt act was not an element of a statutory conspiracy charge. *Nash v. United States*, 229 U.S. 373 (1913); *Singer v. United States*, 323 U.S. 338 (1945). Those cases, however, represent two decisions in an historical expansion of conspiracy prosecutions which have subsequently provoked strong cautionary language from this Court and from commentators. Thus, their continued persuasiveness is suspect. Since the narcotic conspiracy statute at question was passed in the wake of this criticism, this Court should interpret the statute to require an overt act.

1. The Expansion Of The Definition Of Conspiracy.

As noted above, the Court of Star Chamber in the early seventeenth century extended the concept of conspiracy law well beyond its original statutory purpose. The Star Chamber took it upon itself to punish all "errors creeping into the Commonwealth." Hudson, *A Treatise on the Court of Star Chamber* 2 Hargrave, *Collectianea Juridica* 107 (1792), quoted in Harno, 89 U. Pa. L. Rev. at 626-627. Suspicious of any private groupings which might pose a threat to the common good, it found its means of control in conspiracy law.

This attitude and expansion was continued in the King's Bench as courts found more and more types of agreements subject to prosecution for conspiracy. These cases evolved piecemeal based upon loose dicta in prior cases. In 1716, in *Pleas of the Crown*, Hawkins first suggested that conspiracies reached agreements to commit acts that were not themselves criminal, stating "there can be no doubt, but that all confederacies whatsoever, wrongfully to prejudice a third person, are highly criminal at common law." Hawkins, *Pleas of the Crown*, Bk. I, C. 72, § 2, 348 (6 ed.), quoted in Sayre, 35 Harv. L. Rev. at 402. This definition was based on questionable authority. *See* Pollack, *Common Law Conspiracy*, 35 Geo. L.J. 328, 344 (1947) [hereinafter "Pollack"]; Sayre at 402; Wright at 70, n. 10. Nonetheless, it was seized upon by the courts and developed until Lord Denman refined it with his "antithesis" stating that a conspiracy indictment must "charge a conspiracy either to do an unlawful act or a lawful act by unlawful means." *Rex v. Jones*, 4 B. & Ad. 345, 349, 110 Eng. Rep. 485, 487 (1832). *See* Sayre, 35 Harv. L. Rev. at 402-404. Lord Denman later repudiated this definition. *Reg. v. Peck*, 9 Ad. & E. 686, 690, 112 Eng. Rep. 1372, 1373 (1839). Notwithstanding the repudiation, "it came to be considered as a sacred and final dispensation of the law." Sayre, 35 Harv. L. Rev. at 405. It was essentially repeated by this Court in *Pettibone v. United States*, 148 U.S. 197 (1893):

> A conspiracy is sufficiently described as a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means.

Id. at 203.

This definition, however, left to judges a tremendous range of discretion to create crimes. As one court summarized,

> The unsettled state of the law of conspiracy has arisen . . . from a gradual extension of the limits of the offense; each case having been decided on its own peculiar circumstances, without reference to any pre-established

> principle. . . . There is in the books an unusual want of precision in the terms used to describe the distinctive features of guilt or innocence.

Commonwealth v. Carlisle, Brightly's Reports 36, 38 (Pa. 1821). In practice, "the law of conspiracy became an economic and political weapon, used against a rising labor movement and against groups threatening the *status quo* in many other areas of society." Goldstein, 68 Yale L.J. at 416; *see* Sayre, 35 Harv. L. Rev. at 413-416; Digby, *The Law of Criminal Conspiracy in England and Ireland*, 6 L.Q. Rev. 129, 134-143 (1890). The nebulous definition of conspiracy allowed courts in this country to punish combinations of employees to strike for higher wages. *The Philadelphia Cordwainers Case*(1806).[4] At the same time, the definition retained enough flexibility for courts to hold that combinations of employers banded together to depress wages were not criminal. *Carlisle*, Brightly's Reports 36. It was also used in this country to suppress political association and speech. *See, e.g., Dennis v. United States*, 341 U.S. 494 (1951); *Schenck v. United States*, 249 U.S. 47 (1919). In the anti-trust context, moreover, this Court went so far as to dispense even with the requirement that there be an agreement, despite the oft-repeated statement that an agreement was the gist of conspiracy law. *United States v. Masonite Corp.*, 316 U.S. 265, 275 (1942) ("It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part or the conspirators . . .").

2. *Nash* And *Singer*.

In the midst of this unchecked expansion of conspiracy law, this Court first considered a conspiracy statute without

[4] This case was apparently printed in pamphlet form. It was reprinted in full in 3 Commons and Gilmore, *Documentary History of American Industrial Society* 59-248. *See* Sayre, 35 Harv. L. Rev. at 414.

an explicit overt act requirement. *Nash* was an anti-trust case which reversed convictions under the Sherman Anti-Trust Act for instructional error. 229 U.S. 373. By way of dictum, the Court also addressed other challenges to the prosecution. As in *Masonite Corp.*, the *Nash* Court continued to interpret anti-trust law broadly. The Court tossed aside an objection that the Act's proscriptions were so vague that "a man might find himself in prison because his honest judgment did not anticipate that of a jury of less competent men." 229 U.S. at 376. The Court found no difficulty with the potential under the Act that "a man's fate depends on his estimating rightly." *Id.* at 377. Furthermore, this Court continued to hold that conspiracy law could punish agreements to commit acts that "would not have constituted an offence if they had been done." *Id.* at 378. Finally, also in dicta, the Court addressed whether the Act required proof of an overt act. In keeping with the policy of expanding the reach of anti-trust law, this Court held that no such act was required.

This Court next faced the task of construing a conspiracy statute with no explicit overt act requirement in *Singer*. Although the case construed a statute prohibiting conspiracy to avoid the draft rather than an anti-trust conspiracy, this Court felt confined by its holding in *Nash* to extend the reach of conspiracy law outside the anti-trust context. Thus, this Court held that under this statute, the prosecution need not prove an overt act. *Singer*, 323 U.S. at 340.

3. Retreat From Expansive Interpretations Of Conspiracy Law.

Soon after this Court's decision in *Singer*, however, Justice Frankfurter, writing for himself and Justice Jackson,